(3) (2)

Nos. 04-174 & 04-221

Supreme Court, U.S.
FILED
OCT 4 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MAYNARD R. JOYCE, *et al.*,

Petitioners,

-and-

RONNIE LYNN GOFORTH, SUSAN D. GOFORTH, and WEAVER ENTERPRISES, INC.,

Petitioners,

v.

EAST TENNESSEE NATURAL GAS COMPANY,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners present only one question for review, although they have stated it two different ways. Respondent East Tennessee Natural Gas Company ("ETNG") believes that the issue is more properly stated as follows:

Consistent with courts across the country, and as authorized by Fed. R. Civ. P. 65 and 71A, did the district court properly issue a preliminary injunction granting ETNG possession of easements for the construction and operation of an underground natural gas pipeline on Petitioners' properties after first determining that ETNG had a substantive right to condemn the easements?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, East Tennessee Natural Gas, LLC f/k/a East Tennessee Natural Gas Company has the following parent corporations:

ETNG is an indirect wholly owned subsidiary corporation of Duke Energy Corporation that is publicly traded.

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JURISDICTION

This Court does not have jurisdiction over the matter of *Ronnie Lynn Goforth and Susan D. Goforth v. East Tennessee Natural Gas Company*. Although the docket record indicates to the contrary, the Goforths' case was not consolidated with any other cases before the Fourth Circuit. The Goforths failed to file a petition for rehearing or rehearing *en banc* in the Fourth Circuit. Thus, the time to file a petition for a writ of certiorari in this Court expired prior to the filing of this Petition. Sup. Ct. Rule 13(3). The time limit to file a petition for writ of certiorari is mandatory and jurisdictional. *See Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 99 (1994).

The Goforths attempt to circumvent this error by filing a joint petition for a writ of certiorari with Petitioner Weaver Enterprises. Unlike the Goforths, Weaver Enterprises filed a petition for rehearing or rehearing *en banc* in the Fourth Circuit and its Petition to this Court is timely.

STATEMENT OF THE CASE

Following a 16-month review process, the Federal Energy Regulatory Commission ("FERC") issued ETNG a certificate of public convenience and necessity to construct an interstate natural gas pipeline known as the Patriot Project to serve the natural gas needs of portions of Tennessee, Virginia, and North Carolina. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 12a-13a.[1] FERC required ETNG

1. This Response is filed in response to two separate petitions. The Petitioners in *Joyce, et al. v. East Tennessee Natural Gas Co.*, 04-0174 will be referred to herein as "Joyce Petitioners." The (Cont'd)

to complete the Patriot Project by January 1, 2005. Upon issuance of the certificate of public convenience and necessity, pursuant to the Natural Gas Act, ETNG became vested with the power of eminent domain over any lands needed for the project. 15 U.S.C. § 717f(h).

ETNG's attempts to amicably acquire easements from affected landowners were largely successful. Of the more than 1300 landowners affected by the Patriot Project, in excess of ninety percent of the landowners reached agreement with ETNG without the necessity of litigation. Pet. App. at 14a. To acquire easements in the remaining parcels, ETNG filed 133 condemnation actions, naming as defendants those landowners with whom it had been unable to reach agreement, including Petitioners. Consistent with the certificate of public convenience and necessity, ETNG sought to condemn temporary (two-year) and permanent easements, each generally no wider than 50 feet. Along with the complaint in each case, ETNG filed motions requesting that the district court use its inherent equitable power to grant it immediate possession of the easements requested. ETNG pleaded that it was without an adequate legal remedy and it would suffer great delay and expense if not allowed possession prior to a determination of just compensation.

ETNG also deposited funds with the district court for the temporary and permanent easement interests in each parcel of land in amounts estimated to be just compensation for the individual tracts affected. The defendant landowners

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(Cont'd)

Petitioners in *Goforth, et al. v. East Tennessee Nat. Gas Co.*, 04-0221 will be referred to herein as "Weaver Petitioners." Both groups of Petitioners will be referred to collectively as "Petitioners." References to the Appendix will be to the Joyce appendix.

are allowed to immediately draw down the money ETNG deposited. Pet. App. at 32a, 42a. After the condemnation actions were filed, ETNG reached settlements with additional landowners.

On March 4, 2003, following an initial hearing on the matter, the district court bifurcated the cases. Pet. App. at 49a. In phase one, the district court would consider ETNG's right to condemn. In phase two, pursuant to Fed. R. Civ. P. 71A, a commission would determine compensation due the defendant landowners. Pet. App. at 49a. On May 8, 2003, after a second hearing on the matter, the district court entered an order and memorandum opinion finding that ETNG "has established its right to exercise eminent domain over the defendants' property" and granting ETNG's motion for possession contingent on ETNG meeting other requirements set forth in that order. Pet. App. at 63a. On June 6, 2003, the district court entered a supplemental memorandum opinion addressing Petitioners' arguments against ETNG's immediate possession of the property. Pet. App. at 38a-42a. The district court held that "Congress entrusted the issue of immediate possession to the equitable powers of the Court." *Id* at 39a. The district court further considered each of the four requirements for injunctive relief and found them satisfied. Pet. App. at 40a-42a.

Petitioners thereafter conceded that the district court properly determined that ETNG has the right to condemn their property for a natural gas pipeline that is necessary to serve the public needs of citizens in North Carolina, Virginia and Tennessee. Pet. App. at 15a.

On March 22, 2004, the Fourth Circuit issued its opinion affirming the district court's injunction order. Pet. App. at

1a-35a.[2] The Fourth Circuit held that the district court's injunction order was consistent with the U.S. Constitution, established principals of equity, the Natural Gas Act, the Federal Rules of Civil Procedure, and was not an abuse of discretion. Pet. App. at 29a. The Fourth Circuit noted that "the need for natural gas in a region with little or no service — made it especially appropriate for the district court to consider equitable relief that would allow expeditious construction of the pipeline." *Id.* Petitioners' requests for rehearing and for rehearing *en banc* (other than the putative Goforth petitioners) were denied. Pet. App. at 65a-74a.

Construction of the Patriot Project has been completed and natural gas is flowing through the pipeline. ETNG may not now abandon or terminate its operation of the pipeline and the provision of natural gas provided by the Patriot Project without a FERC order under 15 U.S.C. § 717f(b). If the district court had not exercised its inherent equitable power, the pipeline would not have been completed by the date FERC required and citizens of several states would be without the necessary energy the pipeline now provides.

REASONS FOR DENYING THE PETITION

The Court should deny the Petitions. First, the Fourth Circuit's well-reasoned decision does not conflict with the decision of any other Circuit. Unremarkably, the Fourth Circuit affirmed the use of a remedy often used to facilitate the construction of linear pipeline projects necessitated by our growing energy needs. Long-standing precedents allow

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2. The Fourth Circuit's opinion is reported at 361 F.3d 803 (4th Cir. 2004). References to the opinion will refer to the Joyce Petitioners' appendix instead of the reported decision.

immediate possession of condemned property prior to the payment of just compensation. The use of injunctive relief below does not raise important, new or unanswered questions of federal law.[3] Second, Petitioners' separation of powers argument is futile. The remedy employed below and by other federal courts flows from the specific grant of the power of eminent domain to natural gas companies and complies with Fed. R. Civ. P. 71A. Third, Petitioners' attempt to equate quick take powers with injunctive relief ignores the fundamental differences between the two remedies. Fourth, the courts below did not expand the use of injunctive relief. Fifth, contrary to the Weaver Enterprises Petitioners' argument, landowners are entitled to just compensation, not to profit at the public's expense.

Simply put, Petitioners articulate no compelling reason for review by this Court. Sup. Ct. R. 10.[4]

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3. Petitioners challenge only whether injunctive relief is available. They implicitly concede that if it is available, they have no complaint about its use here.

4. The Joyce Petitioners' complaint that the district court erred by ordering the United States Marshal's Service to aid in the enforcement of the court's possession order if necessary (Joyce Pet. at i, 3, 30), was never raised below. Even if the Court were inclined to reach this never-before raised argument, it is unsupported by any authority. Moreover, Petitioners Joyce's statement that "[t]he marshals, at the direction of ETNG, patrolled the landowner's property and has [sic] maintained a constant presence throughout the construction" (*id.* at 3) is inaccurate and unsupported in the record.

I. No Conflict Exists Between the Decisions of the Fourth Circuit and the Seventh Circuit.

The Fourth Circuit's decision does not conflict with *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998). In *Northern Border*, unlike the case *sub judice*, the pipeline company did not claim a substantive entitlement to the property and specifically disavowed such entitlement. *Id.* at 472. The Seventh Circuit held that absent a determination of a substantive entitlement to the property, the district court properly denied the request for an injunction. *Id.* As the Fourth Circuit pointed out, *Northern Border* is distinguishable because the company in that case had not obtained an order determining that it had the right to condemn before it sought injunctive relief. Pet. App. at 29a. Because ETNG did obtain such an order, unlike the company in *Northern Border*, its request for injunctive relief was "grounded in substantive law establishing a preexisting entitlement to the property." ETNG was thus justified in invoking the district court's equity jurisdiction. Pet. App. at 29a-30a ("once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction").

Subsequent to *Northern Border*, several district courts in the jurisdiction of the Seventh Circuit have addressed the Seventh Circuit's "substantive entitlement" requirement. In both *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F. Supp. 2d 976 (N.D. Ill. 2002), (citing, *Commercial Station Post Office v. United States*, 48 F.2d 183, 184 (8th Cir. 1931)) and *Northern Border Pipeline Co. v. 64.11 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000) (distinguishing

Northern Border Pipeline Co. v. 86.72 Acres of Land and holding that an order of condemnation gives the pipeline company a "substantive entitlement" to immediate possession), the courts granted immediate possession after first entering orders confirming the plaintiffs' proper exercise of the power of eminent domain but before compensation was determined. That is precisely the procedure that the district court in the instant case followed.

As the Fourth Circuit stated, after first determining that ETNG had a substantive right to condemn the landowners' property, the district court could then properly consider whether to grant the condemnor's request for injunctive relief. Pet. App. at 29a-30a. The right to condemn flows from § 717f(h) and after an affirmative determination that the natural gas company has complied with its requirements the gas company has a substantive right to condemn.[5] This property interest is one "which a court of equity will enforce and protect." *See Seymour v. Freer*, 75 U.S. 202, 213-14 (1868).

In sum, the Fourth Circuit correctly reasoned that *Northern Border* does not support Petitioners' argument. Pet. App. at 28a-29a. There is no conflict between the Circuits. To the contrary, and as discussed below, a uniform and now substantial body of federal case law supports this equitable remedy.

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5. Petitioners challenged ETNG right to condemn the property before the district court. Each of their challenges to ETNG's right to take was considered and rejected by the district court. Pet. App. at 46a-64a. However, as stated above, this point was conceded on appeal. Pet. App. at 15a.

II. The District Court's Preliminary Injunction Order Granting ETNG Immediate Possession Does Not Violate the Separation of Powers Doctrine.

A. Congress did not expressly limit equitable relief in the Natural Gas Act.

Petitioners contend that a condemning authority may only seize property prior to paying just compensation when specifically authorized by Congress. Yet, they fail to cite a single case holding that the use of the injunction procedure to award possession before payment of just compensation is improper. Moreover, their argument is contrary to the well-settled tenet of statutory construction that a court will presume the availability of all remedies unless Congress has expressly provided to the contrary. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992); *Bell v. Hood*, 327 U.S. 678, 684 (1946).

This Court has held that it will not lightly assume that Congress has stripped courts of their equitable jurisdiction; rather a departure from equity requires a clear and valid legislative command. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The "power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." A statute's silence on a particular remedy "'is no more significant than the fact that it does not in terms authorize the execution to issue on a judgment.'" *Franklin*, 503 U.S. at 68 (quoting, *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940)). In *Franklin*, this Court held that a plaintiff had a private cause of action pursuant to 20 U.S.C. §§ 1681-88 (Title IX) even

though a private right of action is not expressly set out in the statute. 503 U.S. at 70-71. In addition, available remedies specifically include equitable remedies, even when they are not spelled out in the statute. *See Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (citations omitted) (affirming the district court's finding of equitable remedies for beneficiaries of individual Indian trust accounts against agencies that had mismanaged the trusts, even though the federal statutes protecting the Indian trust accounts did not specifically provide for equitable remedies). This Court has also emphasized that in cases involving the public interest as identified by statute, which this case involves, a court's equitable discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases." *Hecht*, 321 U.S. at 331. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 552 (1937) (citations omitted).

FERC determined that the construction of ETNG's pipeline was in the public interest and established an in-service date of January 1, 2005. Thus, the district court properly exercised its equitable authority and allowed ETNG to enter the properties to construct the pipeline.

The Joyce Petitioners' reliance on the Court's holding in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) to support their argument that immediate possession is a power of eminent domain vested in Congress that cannot be authorized by the judiciary without explicit grant from

Congress (Pet., *passim*) is misplaced. *Youngstown* involved a situation in which the President through executive order took temporary possession of steel mills to avoid a nationwide steelworkers strike. The President did not assert he was entitled to take permanent title to the steel mills or that he was operating under a statutory power of eminent domain. This Court held that the President did not have the authority to issue such an executive order. *Id* at 585. The Constitution did not give the President this authority and there was no act of Congress from which this power could fairly be implied. *Id.* at 585. Moreover, Congress had specifically considered and rejected an amendment to the Taft-Hartley Act that would have authorized seizure of property under certain circumstances to avoid a labor dispute. *Id.* at 586. In the case at hand, Congress specifically authorized the use of eminent domain by interstate natural gas companies upon receipt of a Certificate of Public Convenience and Necessity. 15 U.S.C. § 717f(h).

The Joyce Petitioners also cite to 26 Am. Jur. 2d Eminent Domain § 5 (1996) for the same proposition. Pet. at 7. However, even if authoritative, this section recognizes that while the exercise of the power of eminent domain is a legislative function "once authority is given to exercise the power of eminent domain, the matter ceases to be wholly legislative. . . ." This section does not discuss "quick take," immediate possession or the procedure for permitting possession. *Id.*

Also unavailing is the Joyce Petitioners' reliance upon *Johnson v. Collins Entm't Co.*, 204 F.3d 573, 575 (4th Cir. 2000) in support of their position that the use of equitable power to grant the remedy of immediate possession under these circumstances constitutes impermissible judicial

activism. Pet. at 15. The *Johnson* case does not address the issue of eminent domain powers and deals with the issue of alleged federal judicial infringement over basic state regulatory functions. Interestingly, Petitioners deleted from their quotation of the Court's opinion the specific circumstances of the "judicial activism." The quotation properly reads "[i]nherent power wielded by life-tenured judges without authorization in statute *over the basic functions of a sovereign state* simply go too far." *Johnson* at 575 (emphasis supplied). Considered in its context, *Johnson* does not support Petitioner's argument.

B. The remedy approved by the Fourth Circuit and a myriad of other courts is consistent with the procedural framework of Rule 71A.

Rule 71A of the Federal Rules of Civil Procedure was adopted to provide uniformity to the various condemnation procedures and sets forth certain procedures specific to condemnation. *Kirby Forest Industries, Inc. v. United States*, 476 U.S. 1, 4 (1984).

The drafters of Rule 71A specifically contemplated the condemning authority taking possession prior to a hearing on just compensation. Specifically, Rule 71A provides:

> If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or *taken possession*, the plaintiff may dismiss the action as to that property, without an order of the court . . .

71A F. R. Civ. P. 71A(i)(l) (emphasis supplied).

Rule 71A also addresses the applicability of other rules of civil procedure in condemnation proceedings.

> The Rules of Civil Procedure for the United States District Courts govern the procedure for condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

F. R. Civ. P. 71A(a). The remaining sections of Rule 71A do not limit the use of Rule 65 in condemnation matters. Thus, Rule 65 remains a viable remedy in condemnation actions.

Likewise, as the Fourth Circuit held, Congress tacitly approved the Federal Rules of Civil Procedure, including Rules 65 and 71A: "Congress has never given any indication that it disapproves of [the use of the injunction procedure]" even in light of the extensive case law utilizing this procedure.[6] Pet. App. at 23a.

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6. *See, e.g., Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across .152 acres of land*, 2003 U.S. Dist. Lexis 11163 (N.D. Ill. 2003); *Northwest Pipeline Corp. v. The 20'x 1,430' Pipeline Right of Way Easement*, 197 F. Supp. 2d 1241 (E.D. Wash. 2002); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F. Supp. 2d 976 (N.D. Ill. 2002) (citing, *Commercial Station Post Office v. United States*, 48 F.2d 183, 184 (8th Cir. 1931)); *Vector Pipeline, L.P. v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 951 (N.D. Ill. 2001); *Northern Border Pipeline Co. v. 64.11 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000); *Tennessee Gas Pipeline v. New England Power, C.T.L., Inc.*, 6 F. Supp. 2d 102, 104 (D. Minn. 1998); *USG Pipeline Co. v. 1.74 Acres of Land in Marion County, Tennessee*, 1 F. Supp. 2d 816, 826 (E.D. Tenn. 1998); *Kern River Gas Transmission Co. v. Clark County, Nevada*, 757 F. Supp. 1110, 1117 (D. Nev. 1990); *Northern Border Pipeline Co. v. 127.79 Acres*

(Cont'd)

In sum, Petitioners' separation of powers argument is makeweight and overlooks the substantial authority supporting the granting of injunctive relief to effect a substantive right granted by Congress.

III. The District Court Did Not Grant ETNG "Quick Take" Rights or Powers.

Below and in this Court, the Joyce Petitioners improperly equate the "quick take" remedy with the separate and distinct injunction remedy. Petitioners ask this Court to make the illogical leap that because Congress did not grant natural gas companies quick take power, Congress precluded district courts from using their equitable power to grant natural gas companies immediate possession. The primary fallacy in this argument is that the two remedies are fundamentally different.[7] "Quick take"

(Cont'd)

of Land, 520 F. Supp. 170 (D.N.D. 1981). Other courts have held that immediate possession is an available and appropriate remedy provided the condemning authority can make the appropriate showing of need. *Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land*, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000); *Humphries v. Williams Natural Gas Co.*, 48 F. Supp. 2d 1276, 1280 (D. Kan. 1999).

7. The Joyce Petitioners punctuate their brief with references to "these powers" or "such powers," lumping together the very different, virtually automatic, quick take power with the more stringent requirements for injunctive relief. The Joyce Petitioners also mischaracterize the Fourth Circuit's holding to advance their argument. The Fourth Circuit did not conclude that district courts are authorized by Rule 65 to grant quick take power in the form of injunctive relief. Pet. at 17, 18, 21. The Fourth Circuit instead held that "a gas company with condemnation power under the NGA may apply under Rule 65(a) for a preliminary injunction awarding immediate possession." Pet. App. at 23a.

is the ***automatic vesting*** of title in the condemner after certain procedural steps have been taken. Pet. App. at 24a; 40 U.S.C. § 3114. For example, the Declaration of Taking Act authorizes the government to take possession of condemned land immediately upon the filing of a declaration that cites the authority for the taking, describes the public use and includes a deposit of funds with the court equal to the estimated just compensation due the landowner. 40 U.S.C. § 3114(a). The process involves minimal judicial oversight by the district court.

In contrast, granting a natural gas company immediate possession through an injunction is far from an automatic procedure. Courts that have used their equitable powers to grant immediate possession have done so only after a deliberate and careful analysis of the strict requirements for such relief. *E.g.*, Pet. App. at 40a-42a. In fact, one district court held the natural gas company failed to meet the requirements for equitable relief and denied its request. *See Nat'l Fuel Gas Supply Corp. v. 138 Acres*, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000) (equitable relief "unwarranted" where the evidence conflicted on whether the company would be irreparably harmed absent issuance of an injunction). The New York district court's decision refutes the Weaver Enterprises' argument that an injunction is a "result oriented device [used] to ensure that immediate possession will be granted." Weaver Enterprises Pet. at 16. It likewise refutes the Joyce Petitioners' argument that lower courts have turned Rule 65 into a "blank check" for the unrestrained exercise of equitable power. Joyce Pet. at 18. Instead, the remedy of immediate possession effected by a Rule 65 injunction is to be determined on a case by case basis, is permitted only after a judicial finding of a substantive right to take and after the movant has met the rigorous requirements for an injunction as set forth in Rule 65, and construing case law. Pet. App. at 25a.

Therefore, the remedy approved by the Fourth Circuit, and the many district courts that have utilized their inherent equitable power to grant immediate possession, is not inconsistent with Congress' decision to withhold the right of quick take power from private companies who are vested with eminent domain power under the Natural Gas Act. Petitioners' argument requires that the Court overlook the substantial difference between quick take power, which involves minimal judicial oversight, and the exercise of inherent equitable power, which requires substantial consideration by the judiciary, including the right to an immediate appeal. 28 U.S.C. § 1292(a)(1).

IV. The Fourth Circuit's Decision Does Not Expand the Use of Equity to Create Rights That Do Not Exist at Law.

The Joyce Petitioners' argument that the Fourth Circuit's decision opens the gateway for judges to legislate new rights in the guise of granting injunctive relief ignores the well-established standards courts utilize to determine whether injunctive relief is appropriate, including a specific finding that a litigant is likely to prevail on the merits of the substantive rights it is asserting. In this case, the Fourth Circuit's decision specifically reiterated and relied on these well-settled injunction standards as set forth in *Blackwelder Furniture Co. of Statesville, Inc. v. Selig*, 550 F.2d 189 (4th Cir. 1977). Pet. App. at 30a-34a.

The circular nature of Petitioners' argument is evident. Petitioners assert that the district court created new substantive rights by issuing an injunction to enforce ETNG's legal right to take possession of their property; however, Petitioners do not contest that ETNG does in fact hold this

right. Following the Petitioners' logic, injunctive relief would never be available because the enforcement of an undisputed legal right could never occur until the right is fully adjudicated. Such a result diminishes substantive legal rights instead of creating new rights as suggested by Petitioners.

The Fourth Circuit simply disagreed with Petitioners that immediate possession is a substantive right. The court correctly determined that possession of property might be an appropriate remedy after a judicial finding of a substantive right to take and satisfaction of the rigorous requirements to obtain an injunction. This is not the creation of a new substantive right. If ETNG did not have a substantive right to take pursuant to the Natural Gas Act, it would not be proper to invoke the equitable powers of the court to gain possession of the property.

Finally, the courts below properly determined that the equitable remedy of immediate possession is the appropriate method to protect landowners' interests and facilitate construction of projects deemed to be in the public interest. Without such a remedy, people who simply do not want the project in their backyard could prevent construction of a necessary public project jeopardizing the public good.

V. Petitioners are Only Entitled to Just Compensation for Their Properties.

This Court has recognized that "in view of the liability of all property to condemnation for the common good, loss to the owner of non transferable values deriving from his unique need for property or idiosyncratic attachment to it . . . is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). Similarly, the landowner is only "entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is *not* entitled to more." *Olson v. United States*, 292 U.S. 246, 255 (1934) (emphasis supplied); *see also Kirby Forest Indus., Inc.*, 467 U.S. at 10 (landowner is entitled to fair market value of the property on the date of the taking measured by what a willing buyer would pay a willing seller). Price gouging such as that proposed by the Weaver Enterprises Petitioners is contrary to the public interest, undermines the purpose of the power of eminent domain, and is inconsistent with this Court's precedent.

Not surprisingly, the Weaver Enterprises Petitioners fail to cite a single case in support of this putative "right" to negotiate to a higher than fair market value. No "right" exists. Taking their argument to its logical conclusion, every landowner, over 1300 landowners were affected by the Patriot Project, would refuse to negotiate, defend the condemnation complaint, and make every effort to delay the litigation until ETNG was financially forced to abandon the project. Given the capital outlay necessary for a project such as the one at hand ($258 million), public projects deemed necessary by FERC would be abandoned and the country's development of energy infrastructure stymied. Such a result ignores the public's need for natural gas.

CONCLUSION

In light of the foregoing, Ronnie Lynn Goforth and Susan D. Goforth should be dismissed as Petitioners and then these petitions for writs of certiorari should be denied.

Respectfully submitted,

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